SUPREME COURT, U.S.
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No. 92-1612

In the Supreme Court of the United States

OCTOBER TERM, 1992

SOUTHERN PACIFIC TRANSPORTATION COMPANY AND ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Interstate Commerce Commission abused its discretion in adopting a method for calculating how much a railroad granted trackage rights in an earlier consolidation proceeding should pay to the railroad that owned the track.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unpublished, but the decision is noted at 978 F.2d 745 (Table). The decisions of the Interstate Commerce Commission (Pet. App. 7a-199a) are reported at 1 I.C.C.2d 776, 4 I.C.C.2d 668, 5 I.C.C.2d 525, 8 I.C.C.2d 80, and 8 I.C.C.2d 213.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on October 30, 1992. A petition for rehearing was denied on January 6, 1993. Pet. App. 4a.

The petition for a writ of certiorari was filed on April 6, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. More than ten years ago, the ICC approved, and the United States Court of Appeals for the District of Columbia Circuit affirmed, the consolidation of the Union Pacific Railroad Company, the Missouri Pacific Railroad Company (MP), and the Western Pacific Railroad Company (collectively, UP) in light of the substantial public benefits that would accrue from the transaction. *Union Pac. Corp. - Control - Missouri Pac.; Western Pac.*, 366 I.C.C. 462 (1982) (*UP Control*), aff'd *sub nom. Southern Pac. Transp. Co.* v. *ICC*, 736 F.2d 708 (D.C. Cir. 1984) (*Southern Pacific*), cert. denied, 469 U.S. 1208 (1985). The Commission determined that the potential anti-competitive effects of the consolidation could be allayed by granting the applications of several competing railroads for trackage rights to operate their trains over portions of the new consolidated system. *E.g.*, *UP Control*, 366 I.C.C. at 567, 578, 586. Of relevance here, petitioners were awarded trackage rights over MP's lines between Kansas City and St. Louis, Missouri. The object of the award was to permit the establishment of a new competitive route in the central transportation corridor between the West Coast and St. Louis.

The parties to the consolidation proceeding were unable to agree on compensation for the trackage rights during the pendency of the merger proceeding. Nonetheless, the Commission required that the grantees of trackage rights be permitted to com-

mence operations upon consummation of the consolidation. *UP Control*, 366 I.C.C. at 590. The Commission directed the parties to attempt to resolve the compensation disputes on their own (subject to the ICC's approval), or return to the agency if they were unable to do so. *Id.* at 589. As guidance to the parties, the Commission stated that "terms so onerous to the [grantees] as to defeat the purpose of the trackage rights cannot be considered just and reasonable." *Id.* at 590. On appeal, the District of Columbia Circuit rejected petitioners' claim that the ICC's refusal to set compensation terms for the trackage rights before such operations began undermined the Commission's decision. *Southern Pacific*, 736 F.2d at 721. The court observed that "[t]he ICC has in fact guaranteed that it will see to the proper functioning of the trackage rights." *Ibid.*

2. Of all the carriers awarded trackage rights over UP as a condition of approval of the consolidation, petitioners alone were unable to reach agreement with UP on the compensation to be paid and asked the Commission to fix the terms. In the proceedings below, the Commission devised a formula for calculating the monthly compensation to be paid by petitioners for the Kansas City-to-St. Louis trackage rights. Under that formula, petitioners were required to pay UP an amount reflecting (1) the costs caused by petitioners' operations over the line; (2) a usage-based proportional share of the overhead maintenance and operating costs and taxes; and (3) a usage-based proportional share of a "rental" based on the value of the line. See generally Pet. App. 155a-165a (describing methodology).

The major disputes in the compensation proceedings concerned the choice of an investment base, the measure of the rate of return, and petitioners' ability to provide the sort of competitive service envisioned by the Commission in imposing the trackage rights condition. Throughout the proceedings, the Commission remained cognizant of the underlying principle, stated in *UP Control*, 366 I.C.C. at 590, that it would assure that the terms of the trackage rights agreement would not be so onerous as to defeat its purpose. Pet. App. 12a, 93a, 136a-140a, 149a-151a, 164a, 194a-196a. As the Commission observed (Pet. App. 93a):

> We have approached this [methodology] trying to balance two interests: needed competition in the central corridor promoted by just and reasonable compensation terms; and rational compensation to the owning road.
>
> We believe our revisions to the formula reconcile these goals, and we find the compensation terms just and reasonable. * * * By placing the renter in the same position as the owner, we believe we have achieved our goal of assuring a competitive relationship between the two systems on the line.

In addition, the ICC specifically explained (Pet. App. 151a) (citations omitted) why its methodology was consistent with its guidance to the parties in the original *UP Control* proceeding:

> In permitting the transaction to go forward without the compensation issue resolved, we guaranteed that if we were required to set compensation because of the inability of the parties to agree, the

terms of the trackage rights would not be "so onerous to the tenant as to defeat the purpose of the trackage rights." We did not represent that we would establish terms so favorable to [petitioners] as to ensure their willingness to operate the rights we provided. The methodology we have developed in the *Compensation* decisions, as clarified here, establishes reasonable terms for [petitioners'] use of the involved trackage rights. [Petitioners] ha[ve] no right to expect us to establish compensation on a basis that is less than reasonable. Our refusal to do so can hardly be deemed "to defeat the purpose of the trackage rights." The competitive opportunity created by the trackage rights grant was intended to mitigate the competitive harms that might otherwise have been occasioned by the UP/MP/WP consolidation.

In a footnote, the Commission explained (Pet. App. 151a n.13):

"We have said on numerous occasions that we protect competition, not competitors." *Union Pacific Corp., et al. - Cont. - MO-KS-TX Co., et al.*, 4 I.C.C.2d 409, 460 (1988). "Our primary concern is protecting competition. Transfers of traffic among competing carriers are not grounds for rejection of a proposal or imposition of conditions unless a carrier's ability to provide essential services is threatened." *Rio Grande Industries, et al. - Pur. & Track. - CMW Ry. Co.*, 5 I.C.C.2d 952, 968 (1989). "[A] showing of expected substantial harm to a particular *com-*

> *petitor* as a result of a transaction is not equivalent to a showing of harm to *competition*. For example, a rail or truck competitor might lose traffic precisely because a transaction promises the significant public *benefit* of a new, more improved transport alternative. Harm to the competitor would not be grounds for rejection of a proposal or imposition of conditions unless a carrier's ability to provide essential services is threatened." *Rio Grande Ind., Inc. - Pur. & Track. - Soo Line R. Co.*, 6 I.C.C.2d 854, 875 (1990) (emphasis in original). See also *Canadian Pacific Ltd. - Pur. & Trackage - D&H Ry. Co.*, 7 I.C.C.2d 95, 112 (1990).

3. In this action, petitioners sought review of the ICC's compensation decisions in the D.C. Circuit. They claimed that the ICC's compensation methodology would not allow them to compete with UP and therefore would not serve the purpose for which trackage rights had been awarded in the consolidation proceeding. UP also petitioned for review, challenging several technical aspects of the ICC's methodology. The court of appeals denied the petitions for review in an unpublished *per curiam* opinion. Pet. App. 1a-3a. It observed that the ICC based its decisions on "vast amounts of technical evidence" and "reevaluat[ed] and reformulat[ed] its decisions in light of the objections of the petitioners and the production of new evidence." Pet. App. 3a. The court concluded that petitioners were required "*not* merely to put forth an acceptable alternative but rather to demonstrate *clearly and convincingly* a fatal flaw in the action taken," *ibid.* (quoting *Nader* v. *Federal*

Communications Commission, 520 F.2d 182, 195 (D.C. Cir. 1975)), and had failed to meet that burden.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioners seek to overturn the ICC's exercise of its expert judgment in fashioning a methodology for computing the compensation to be paid by the tenant (petitioners) to the landlord (UP) for trackage rights awarded as a condition of the approval of a railroad consolidation. As the court of appeals correctly recognized (Pet. App. 3a), petitioners bear a heavy burden. The methodology implements a condition imposed by the ICC when it approved *UP Control*. The ICC is afforded great leeway in ensuring the proper operation of its orders and the conditions it imposes, as the court of appeals recognized in the decision approving the consolidation at issue here. *Southern Pacific*, 736 F.2d at 721; see also *Seaboard Coast Line R.R.* v. *United States*, 599 F.2d 650, 652 (5th Cir. 1979) (citing *Chesapeake & O. Ry.* v. *United States*, 571 F.2d 1190, 1194 (D.C. Cir. 1977)). Deference is especially appropriate in this case, where the ICC has developed a methodology for determining the rental to be charged for trackage rights operations. *Thompson* v. *Texas M. R.Ry.*, 328 U.S. 134, 148 (1946). The court of appeals was therefore correct in according substantial deference to the ICC's decisions. Pet. App. 2a-3a; see, *e.g.*, *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983); see also *National R.R.*

Passenger Corp. v. *Boston & M. Corp.*, 112 S. Ct. 1394, 1403 (1992).

2. The court of appeals was also correct in concluding that the ICC acted within its discretion in formulating the compensation method for petitioners' exercise of trackage rights and adequately explained its reasons for choosing that method. Petitioners' argument to the contrary is based on two erroneous premises.

First, petitioners err in suggesting (Pet. 3-4) that the ICC was required to give overriding consideration to the competitive impacts of the proposed consolidation under 49 U.S.C. 11344(b)(1)(E) when it developed the compensation method. As the court of appeals recognized in affirming *UP Control*, "the Staggers [Rail] Act [of 1980] [49 U.S.C. 11344(b)(1)(E)] is not formally applicable to this proceeding"; nonetheless, "the Commission elected to adhere to its policies." *Southern Pacific*, 736 F.2d at 715-716. The court also recognized in affirming *UP Control* that, contrary to petitioners' present assertion (Pet. 21), nothing in the Interstate Commerce Act or in the ICC's merger policy requires that a consolidation be pro-competitive or prohibits the approval of a consolidation that results in a substantial lessening of competition. See *Southern Pacific*, 736 F.2d at 716-717.

Petitioners also err in asserting that the compensation method adopted in this case reflects a departure from the policy enunciated by the ICC in imposing the trackage rights condition. Petitioners mischaracterize the agency's reason for imposing the condition. As the ICC explained, the Kansas City-to-

St. Louis trackage rights were granted not to benefit petitioners but to allay the anticompetitive impact of the consolidation of three railroads into the UP system. Pet. App. 149a-151a (citing *UP Control*, 366 I.C.C. at 586-589). In particular, the ICC never undertook to prescribe less than reasonable compensation in order to force UP to underwrite petitioners' ability to compete. *E.g.*, Pet. App. 154a.

By formulating a compensation methodology in these decisions that enables petitioners to compete with UP, the ICC fulfilled its mandate under the statute and the court's decision, and acted consistently with the policies that led to the imposition of the conditions in *UP Control*. In addition, as the court of appeals concluded, the ICC adequately explained its reasons for adopting the methodology. Pet. App. 3a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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